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No. 90-1789

In the Supreme Court of the United States

OCTOBER TERM, 1991

DEXTER LEHTINEN, PETITIONER

v.

S.J. and W. RANCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a tort action against an individual federal employee subject to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679, a certification by the Attorney General that the employee was acting within the scope of his federal employment is subject to review by a federal district court.

2. Whether the court of appeals erred in permitting the United States to file a brief as an appellee, when the United States argued for affirmance of the district court's judgment but challenged the district court's reasoning.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-52) is reported at 913 F.2d 1538. An order modifying the court of appeals' opinion (Pet. App. 53-54) is reported at 924 F.2d 1555. The opinion of the district court (Pet. App. 1-19) is reported at 717 F. Supp. 824.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1990. Orders of the court of appeals amending its earlier opinion and denying petitions for rehearing were entered on February 8, 1991 (Pet. App. 55-58). The petition for a writ of certiorari was filed on May 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the United States Attorney for the Southern District of Florida. In 1988, respondent S.J. & W. Ranch, Inc. (SJ&W) commenced an action against petitioner in the Circuit Court for Okeechobee County, Florida. The complaint asserts claims of libel and slander arising out of petitioner's statements during a press conference at which he announced the institution of a civil forfeiture action involving real property owned by SJ&W. See Pet. App. 5.

In accordance with the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567, codified at 28 U.S.C. 2679 (the Reform Act), the Attorney General's designate certified that petitioner was acting within the scope of his office at the time of the incident out of which SJ&W's claims arose. See 28 U.S.C. 2679(d)(2).[1] Petitioner, represented by the Department of Justice, removed the action to federal court and moved to substitute the United States as the defendant. The United States also moved for summary judgment, arguing that, upon substitution, the action would be barred by 28 U.S.C. 2680(h). That provision prohibits suit against the United States under the Federal Tort Claims Act on claims "arising out of * * * libel [or] slander." 28 U.S.C. 2680(h); see generally *United States* v. *Smith*, 111 S. Ct. 1180 (1991).[2]

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[1] The certification was issued by John J. Farley, III, Director of the Torts Branch, Civil Division. The Attorney General had delegated his authority to issue scope certifications to Mr. Farley, among others. See 28 C.F.R. 15.3.

[2] In *United States* v. *Smith*, *supra*, this Court held that the Reform Act applies – and requires substitution of the United States in place of federal employees sued on account of acts within the scope of their

SJ&W opposed substitution of the United States as defendant and moved for a remand to state court, arguing that petitioner had acted outside the scope of his office in making the statements at issue. Pet. App. 5-7.

The district court substituted the United States as the defendant and dismissed the action. Pet. App. 1-19. The court held, consistent with the position the Department had advanced on petitioner's behalf, that substitution was mandatory because the "certification of scope of employment is not subject to judicial review and is conclusive and binding upon [the district court]." *Id.* at 7a; see *id.* at 9a-12a. The court also concluded that since SJ&W's claims "arise

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employment—even if an exception to the FTCA bars the pursuit of the claim against the United States.

The Reform Act provides, with exceptions not relevant to this case, that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee." 28 U.S.C. 2679(b)(1). To enforce the exclusivity of the FTCA remedy, the Act provides for what have come to be known as "scope certifications." In actions commenced against federal employees in federal or state court, the Attorney General is empowered to certify that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1)-(2). If the Attorney General refuses to issue such a certification, the employee may seek one from the court. 28 U.S.C. 2679(d)(3). Upon certification, the action is "deemed an action against the United States"; "the United States is substituted as the party defendant"; and the action "proceed[s] in the same manner as any action against the United States" under the FTCA. 28 U.S.C. 2679(d)(1)-(4). As *Smith* and this case reflect, application of these provisions can result in dismissal of an action that might have been pursued against the individual employee; accordingly, some plaintiffs, such as SJ&W, have an interest in challenging a scope certification.

out of the intentional torts of libel and slander," it had "no subject matter jurisdiction over those claims." *Id.* at 13a (citing 28 U.S.C. 2680(h)). Finally, the court rejected the contention that the Reform Act violated SJ&W's constitutional rights to substantive and procedural due process. Pet. App. 13-18.

2. a. SJ&W noticed an appeal. While the appeal was pending, the Department of Justice reassessed its position on the issue whether the Reform Act permits judicial review of scope certifications. At the end of its review, the Department concluded that the Act should be construed to allow judicial review of scope determinations by the Attorney General and his designates. See Pet. App. 27-28 & n.1.

In the court of appeals, the Department of Justice represented the United States, and petitioner was represented by private counsel. Petitioner contended that the district court had been correct in its determination that the scope certification was conclusive. Appearing as an appellee, the United States also argued that the district court's judgment should be affirmed, but on grounds different from those advanced by petitioner. The government contended that, although the scope certification was subject to judicial review, the record before the district court was sufficient to sustain a finding that petitioner was acting within the scope of his employment. Petitioner moved to strike the portion of the government's brief that argued that scope certifications are subject to judicial review. His motion contended that the government, having failed to notice a cross-appeal, was precluded from arguing for a modification of the judgment. See Pet. App. 28-29 n.2.

b. The court of appeals denied the motion to strike, reversed the district court's judgment, and remanded for further proceedings. Pet. App. 20-52. The court found that the motion to strike "bor der[ed] on the frivolous" since the

government was "not seeking to modify the relief it received below," but rather was "defending the district court's judgment on different, and in its view, more tenable grounds." *Id.* at 28-29 n.2.

On the merits, the court of appeals concluded that the Reform Act does not foreclose judicial review of an administrative scope certification. Addressing first the language of the statute, the court explained that "the statute, on its face, does not explicitly preclude judicial review of [a] scope certification with respect to the substitution of the United States" and "the statute's express provision that certification 'shall conclusively establish scope of office or employment *for purposes of removal*,' suggests that Congress intended to make scope certification unreviewable only with respect to removal." Pet. App. 32-33. The court found further support for that interpretation in provisions of the Act that authorize removal of actions to federal court and permit a federal employee who is denied a scope certification by the Attorney General to seek one from a court. *Id.* at 33.

The legislative history, the court continued, also indicated "that the district court's interpretation was in error." Pet. App. 34. The court relied primarily on statements during committee hearings by Representative Frank, a sponsor of the legislation who chaired the subcommittee conducting the hearings, and by Deputy Assistant Attorney General Robert Willmore, the Department's representative at the hearings. Both expressed their understanding that an administrative scope certification would be subject to judicial review. *Id.* at 35a-37a (quoting *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128, 133, 197 (1988) [hereinafter *House Hearings*]).

The court found further support for its interpretation in several "additional considerations." Pet. App. 38-43. It also observed that because scope certifications involve issues of state law, "it is reasonable to assume that Congress entrusted the authoritative disposition of this question to the judicial rather than the executive branch." *Id.* at 43.

The court of appeals did not address the United States' contention that the record before the district court was sufficient to support a determination that petitioner acted within the scope of his office with respect to the matters at issue. Instead, it remanded for discovery and "a de novo hearing on whether [petitioner's] conduct occurred within the scope of his employment." Pet. App. 50-51.[3]

ARGUMENT

The court of appeals' determination that the Reform Act permits judicial review of a scope determination is well founded. There is no conflict among the courts of appeals that calls for this Court's attention. Further review is therefore not warranted.

1. a. The text of the Reform Act is susceptible to two readings with respect to the reviewability of administrative scope determinations. As the district court noted (Pet. App. 9-10), much of Section 2679(d) is phrased in mandatory terms. Section 2679(d)(2), which authorizes administrative scope determinations in actions commenced in state court, provides that upon the issuance of a scope certification, "any

[3] The court's original opinion stated that if the district court concluded that petitioner was acting outside the scope of his employment, "it must remand the case back to the state court for trial." Pet. App. 51. In a petition for rehearing, the United States argued that the Reform Act made the Attorney General's scope certification conclusive for purposes of removal and thus foreclosed a remand. The court of appeals issued an order deleting the reference to a remand from its opinion. *Id.* at 53-54.

civil action or proceeding commenced upon such claim in a State court shall be removed" to federal court; that "[s]uch action or proceeding shall be deemed to be an action or proceeding brought against the United States under" the FTCA; and that "the United States shall be substituted as the party defendant." Upon substitution, Section 2679(d)(4) continues, the action "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions." Read in isolation, these provisions suggest that removal and substitution must irrevocably follow any scope determination by the Attorney General.[4]

On the other hand, the Act does not expressly prohibit a court that has complied with the Act's mandatory language by substituting the United States as the defendant from considering a motion to resubstitute based upon a showing that the employee was in fact acting outside the scope of his employment. That is, the statutory language does not state that an administrative scope certification is conclusive for purposes of substitution. To the contrary, the only provision that directly addresses the preclusive effect of a scope certification is subject to an express qualification. Section

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[4] The fact that the Act provides an employee who has been denied a scope certification with a means of seeking a certification from a court, but does not provide expressly for administrative review of the issuance of a scope certification provides additional support for that interpretation. See *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984) (preclusion of judicial review "fairly discernible" from "statutory scheme" that grants right of review to specified parties, in specified circumstances). Furthermore, such a reading of the Reform Act would advance the Act's objective of freeing federal employees from the burdens and distractions of tort litigation. See Reform Act, § 2(a)(5) and (6), 102 Stat. 4563; H.R. Rep. No. 700, 100th Cong., 2d Sess. 2-3 (1988).

2679(d)(2) provides that scope certifications by the Attorney General "shall conclusively establish scope of office or employment *for purposes of removal*" (emphasis added). In the same vein, Section 2679(d)(1), the provision that addresses scope certifications in cases commenced in federal court (which, by their nature, result in substitution but not removal), includes no comparable language regarding the conclusiveness of that category of scope certifications.

Read together, these provisions suggest that Congress intended to make administrative scope certifications conclusive and unreviewable *only* for purposes of removal.[5]

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[5] Petitioner contends (Pet. 33-35) that the Reform Act cannot fairly be read to make a scope certification conclusive only for purposes of removal, since Section 2679(d)(4) provides that actions in which the Attorney General has issued a scope certification "shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)]." In his view, this provision makes Section 1346(b) the exclusive source of federal jurisdiction over actions in which scope certifications have been issued; since that Section applies only to actions against the United States, he reasons, resubstitution of the employee as a defendant would deprive the court of any continuing jurisdiction over the case.

We disagree. Section 2679(d)(2) is a fully sufficient grant of removal jurisdiction over cases, commenced in state court, in which the Attorney General has issued a scope certification. That Section provides that upon certification, a state court action "shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." 28 U.S.C. 2679(d)(2). This grant of jurisdiction is sufficient to sustain the district court's authority to retain a case even if, on review of the administrative scope determination, the court concludes that the federal employee was acting outside the scope of his employment. Such a scheme is plainly constitutional. The Reform Act creates a federal immunity defense, and provides for the resolution of that defense in federal court. See also 28 U.S.C. 2679(d)(3) (authorizing removal in cases in which employees assert a right to a scope certification). The fact that a federal district

Such a scheme would represent a reasonable accommodation of the interests of the United States, federal employees, and plaintiffs in scope certifications. Making a certification conclusive for purposes of removal only would guarantee that issues regarding scope of employment would be subject to review in a federal court of appeals and would assure that claims involving conduct arguably within the scope of employment were resolved in a federal forum, while protecting plaintiffs against unwarranted dismissals of claims against employees.

That reading is buttressed by the "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Moreover, because the language of the Act is ambiguous with respect to the reviewability of administrative scope determinations, resort to the Act's legislative history is justified. See, *e.g.*, *McDaniel* v. *Sanchez*, 452 U.S. 130, 146-147 (1981). That history establishes that key supporters of the legislation envisaged judicial review of administrative scope certifications.

During House committee hearings on the Reform Act, Representative Frank, a co-sponsor of the bill and the chairman of the subcommittee conducting the hearings, stated his understanding that "the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification." *House Hearings* 128; see *id.* at 197. Shortly thereafter, Deputy

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court may determine that an employee is not entitled to that defense does not undercut its continuing jurisdiction over a case. As this Court has recognized in the context of pendent jurisdiction, as long as a federal issue sufficient to sustain jurisdiction is present when a case is brought to federal court, the court may constitutionally adjudicate the case as a whole. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Cf. *Mesa* v. *California*, 489 U.S. 121, 133, 136 (1989) (recognizing that federal immunity defense is sufficient to sustain federal jurisdiction).

Assistant Attorney General Willmore, who was testifying on behalf of the Department, expressed his agreement with Representative Frank's view, stating, "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." *Id.* at 133. Nothing in the legislative history contradicts this understanding, and it is squarely on point. See Pet. App. 34a-38a; *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).[6]

On balance, it is our view that the court of appeals' interpretation is the better of the two possible constructions. That interpretation is literally consistent with all of the language of Section 2679(d); it gives effect to the qualification—"for purposes of removal"—in the only provision that expressly addresses the conclusive effect of scope certifications; it represents a reasonable accommodation among the interests of all concerned; and it finds substantial support in the presumption in favor of judicial review of administrative action and in the legislative history.

b. Contrary to petitioner's suggestion (*e.g.*, Pet. 15-16), there is no conflict among the circuits calling for this Court's review. The court of appeals' determination that a scope determination by the Attorney General is subject to judicial review is in accord with decisions of five other circuits. See *Nasuti* v. *Scannell*, 906 F.2d 802, 812-813 (1st Cir. 1990);

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[6] As several courts have noted, the Department's change in position on the conclusiveness of scope determinations was based, in substantial part, on its reevaluation of this legislative history. See Pet. App. 27-28 n.1.

The only pertinent passage in the committee report on the Reform Act, H.R. Rep. No. 700, 100th Cong., 2d Sess. 9 (1988) (quoted at Pet. 29), does not address the conclusiveness of administrative scope certifications. Contrary to petitioner's contention, that passage does nothing to resolve the ambiguity in the text of the Reform Act in petitioner's favor. There was no other committee report, and the discussions on the floor of both Houses did not address the matter.

Melo v. *Hafer*, 912 F.2d 628, 640-642 (3d Cir. 1990), cert. granted, 111 S. Ct. 1070 (1991);[7] *Johnson* v. *Carter*, No. 90-3077 (4th Cir. July 8, 1991); *Arbour* v. *Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990); *Hamrick* v. *Franklin*, 931 F.2d 1209, 1210-1211 (7th Cir. 1991). See also *McHugh* v. *University of Vermont*, 758 F. Supp. 945, 950 (D. Vt. 1991), appeal pending, No. 91-6062 (2d Cir.). The two decisions on which petitioner relies, *Mitchell* v. *Carlson*, 896 F.2d 128 (5th Cir. 1990), and *Aviles* v. *Lutz*, 887 F.2d 1046 (10th Cir. 1989), did not hold to the contrary.

In *Mitchell*, the plaintiff's claims arose from an alleged assault occurring in the course of "a heated work-related conversation" with her supervisor. 896 F.2d at 130. The U.S. Attorney certified that the supervisor had been acting within the scope of her employment during the time of the incident, and the district court initially substituted the United States as the defendant. When the United States moved to dismiss the action on the basis of an FTCA exception for assault or battery claims (28 U.S.C. 2680(h)), however, the district court reversed field, granted a motion to resubstitute the supervisor, and remanded the action to state court. The sole basis for the order was the district court's ruling that the Reform Act should not apply to a claim that, because of an FTCA exception, could not be pursued against the United States. *Mitchell* v. *United States*, 709 F. Supp. 767, 769-770 (W.D. Tex. 1989). The plaintiff did not challenge the correctness of the scope certification in that court.

The only issue before the Fifth Circuit under the Reform Act, therefore, was whether a valid certification requires substitution of the United States when the effect is to require dismissal of the action. Anticipating this Court's decision in *United States* v. *Smith*, *supra*, the Fifth Circuit held

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[7] The questions presented in *Melo* do not involve the Reform Act.

that the Reform Act is fully applicable in that situation. The court concluded (896 F.2d at 136):

> We thus find that the district court improperly resubstituted [the supervisor]. Once certified as acting within the scope of her employment, under the [Reform] Act the district court was *required* to substitute the United States for Carlson, and treat the case as a claim under the FTCA.

This passage was clearly limited to the scope certification before the court. Because the plaintiff had not sought review of that scope certification, the court's opinion cannot fairly be read as expressing any opinion on the availability of such judicial review.

Similarly, in *Aviles* v. *Lutz*, the Tenth Circuit held that the Reform Act requires substitution of the United States, upon a valid certification, regardless of whether the plaintiff's claims may be pursued against the United States. In the course of explaining the basis for its conclusion, the court observed that "[t]he mandatory language of [28 U.S.C. 2679(d)] does not permit us to challenge the attorney general's certification." 887 F.2d at 1049. It is not entirely clear that the court was referring to the type of "challenge" at issue in the instant case. As in *Mitchell*, the plaintiff had not contested the scope certification as such, and the court's observation was sandwiched amid discussion of the question whether the Reform Act applies to claims subject to FTCA exceptions. But in any event, any statement directed at the conclusiveness of scope certifications was *dictum*.

Particularly in view of the consensus among the courts of appeals that have expressly addressed the reviewability of scope certifications, the Fifth and Tenth Circuits are very unlikely to regard *Mitchell* and *Aviles* as controlling on that question. Indeed, district courts in both circuits have concluded that those decisions do not foreclose judicial review

of scope certifications.[8] There is no conflict warranting this Court's attention.

2. Petitioner contends that the court of appeals should have stricken the portion of the United States' brief that addressed the reviewability of scope certifications; in his view, the government was required to file a cross-appeal to challenge the district court's reasoning. Pet. 38-40.

As the court of appeals found (Pet. App. 28 n.2), the government was fully justified in following the course it did. Because it was seeking affirmance of the district court's judgment, the United States was not required (and may well not have been permitted) to file a cross-appeal. See *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980). As an appellee, the United States was entitled to assert any legal ground in support of the district court's judgment, *Colautti* v. *Franklin*, 439 U.S. 379, 397 n.16 (1979), and to make the court of appeals aware of its position on all of the issues presented in the appeal. In any event, review of this question would be a meaningless exercise; even if petitioner is correct, reversal of the court of appeals' ruling on the motion to strike would not entitle petitioner to any relief from the judgment on the merits.

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[8] See *Cox* v. *Tulane University*, No. 90-4684 (E.D. La. Apr. 19, 1991); *Vu* v. *Meese*, 755 F. Supp. 1375, 1383 (E.D. La. 1991) (indicating the need for further district court proceedings on scope issues); *Jackson* v. *United States*, 751 F. Supp. 911, 913 (D. Colo. 1990). But see *Fair* v. *Swanson*, 753 F. Supp. 875, 877 (D. Colo. 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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